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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT GOULD and DOWLING BROS. DISTILLING COMPANY, a Kentucky corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review a judgment entered by the Circuit Court of Appeals for the Sixth Circuit on February 8, 1946, affirming the judgment and sentence imposed by the District Court of the United States for the Eastern District of Kentucky. Petitioners' petitions for rehearing were denied on March 11, 1946.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, filed on February 8, 1946, is reported in 153 F. (2d) 353 and is printed in the record at pages 936-948.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., Section 347(a).

The opinion of the Circuit Court of Appeals was filed February 8, 1946; petitions for rehearing were filed February 27, 1946, and a supplement thereto was filed on March 8, 1946; the several petitions for rehearing were denied on March 11, 1946. Application for stay of mandate pending application in this Court for writ of certiorari was made on March 15, 1946, and order staying the mandate pending the application for writ of certiorari in this Court was entered April 1, 1946.

QUESTIONS PRESENTED

Three questions are presented, which, petitioners contend, call for determination by this Court:

1. May separate sentences be imposed upon each of forty-eight counts in an indictment charging sales in violation of the Emergency Price Control Act, as amended, 56 Stat. 23, 28, 50 U. S. C., Section 904(a), War, Appendix, where the acts charged in a substantial number of such counts constitute no separate sales or transactions, but are parts of the identical sales or transactions charged in other counts of the same indictment?

2. May a Kentucky corporation be convicted and sentenced for the sale of its products at prices in excess of those fixed by the Office of Price Administration, where such sales were made by one of its two principal stockholders, who was a director of the corporation, and authorized to sell its products, but not an officer therein, where no other stockholder, director, officer, agent, employee or representative of the corporation had knowledge of the illegal transactions and where the corporation received no benefit therefrom?

3. May the District Court admit, in a criminal trial, evidence as to alleged unlawful acts of the defendant not charged in the indictment and for which the defendant had not been convicted or indicted?

SUMMARY STATEMENT

In January, 1945, petitioners, one a resident of Ohio and the other a Kentucky corporation, were indicted on forty-eight counts charging violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 28, 50 U. S. C., War, Appendix, Section 904(a). The indictment charged sales of distilled spirits at prices in excess of the ceilings fixed by the Office of Price Administration. It was charged that the allegedly unlawful sales were made to two persons over a period of time between June 26, 1943, and December 31, 1943 (R. 2-137).

The indictment disclosed on its face that a substantial number of the forty-eight separate counts was based upon alleged transactions which were, in fact, installments or fragments of identical transactions charged in other counts of the same indictment.

For example, Counts 1 and 2 (R. 2-7), taken together, charge that on June 16, 1943, petitioner Robert Gould agreed to sell one Josselson seven hundred twenty-four cases of whiskey and two hundred cases of rum, invoiced on June 26, 1943 and paid by a single check (R. 207). Thus, the two counts disclose a single sale, initiated in the same interview, invoiced on the same date and paid for by one check. Yet the indictment separated the sale into two counts, one covering whiskey and the other rum.

Counts 1 and 2 merely illustrate what was characteristic of the entire indictment,[1] but they are of special importance

[1] Counts 3, 4, 5 and 6 (R. 7-18), relate to a single sale allegedly agreed to by Gould on July 7, 1943, but covered by four invoices. The same situation characterizes Counts 7 and 9 (R. 18-21, 23-26), Counts 10, 11, 12 and 13 (R. 26-37), Counts 14, 15, 16 and 17 (R. 37-48), Counts 19, 20 and 21 (R. 51-59).

because two consecutive maximum one year sentences were imposed on the basis of these counts.

During the period covered by the indictment, the petitioner, Dowling Bros. Distilling Company, was a Kentucky corporation (R. 372), with its principal office and place of business in Kentucky (R. 651). Petitioner, Robert Gould, owned slightly more than fifty per cent of its stock. Petitioner's brother was the only other substantial stockholder (R. 372-373), but, during the period covered by the indictment, petitioner's brother was serving in the United States Coast Guard (R. 750-751). He was not named in the indictment, nor does the record contain any proof that he participated in any of the acts charged against the corporation.

Petitioner, Robert Gould, was a director, but not an officer, of the petitioner, Dowling Bros. Distilling Company (R. 650). He did, however, make all the sales for the corporation which are charged in the indictment, and controlled most of its sales (R. 352-354, 651). Petitioner, Robert Gould, was also engaged in the whiskey brokerage business (R. 652) and was interested in several other distilleries (R. 652-658). His office and residence were located in Cincinnati, Ohio (R. 567, 649).

In each count of the indictment, it is charged that Robert Gould agreed in Cincinnati to sell certain liquors at unlawful prices; that Dowling Bros. Distilling Company invoiced and shipped such liquor from Burgin, Kentucky, and received payment therefor at lawful prices; and that thereafter purchaser, in accordance with such agreement, paid additional sums over and above the ceiling prices, to "Robert Gould and the Dowling Bros. Distilling Company by means of payment to Robert Gould" in Cincinnati, Ohio (R. 2-128). In each of these counts, the petitioner, Robert Gould, is described as "a principal stockholder and

director of the said Dowling Bros. Distilling Company'' (R. 2-128).

The record contains no evidence that any officer, employee, agent or other representative of Dowling Bros. Distilling Company, except Robert Gould, knew of the alleged agreements to sell whiskey at unlawful prices. Likewise, there is no evidence that the corporation received for its whiskey any sums in excess of lawful selling prices.

During the trial, testimony was introduced by the prosecution relating to alleged illegal transactions not charged in the indictment and for which neither of the petitioners had ever been indicted or convicted (R. 867-889, 892-894, 894-896). This testimony was admitted by the trial court on the mistaken assumption that the petitioner, Robert Gould, had testified during cross-examination that he had never at any time sold any whiskey at over-ceiling prices. The petitioner did not make such a wide statement (R. 685) and the trial judge admitted this assumption to be erroneous (R. 884). Nevertheless, the testimony thus erroneously admitted was allowed to stand as rebuttal over vigorous objection of petitioners' counsel (R. 867-896).

After the jury found both petitioners guilty on all the counts of the indictment, the District Court sentenced petitioner, Robert Gould, to fines totaling $240,000 ($5,000 for each count), and to serve six consecutive one-year terms (in addition to 42 concurrent one-year sentences). The corporation was fined $240,000 ($5,000 for each count) (R. 925).

REASONS FOR GRANTING THE PETITION

The issues presented in this case do not involve mere ordinary errors on the part of the trial court and the Circuit Court of Appeals. They raise basic questions of general concern and fundamental importance.

1. The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

Petitioners contend that, in the instant case, the indictment on its face shows that a substantial number of the forty-eight counts are predicated upon sales or transactions which are mere installments or fragments of the same sales or transactions charged in other counts of the same indictment. For illustration, petitioners have described the relation between Counts 1 and 2 of the indictment on pages 3-4 of the Summary Statement above. If those responsible for the enforcement of the Emergency Price Control Act can, by fragmentizing what is essentially a single transaction, create double or triple punishment for a single offense, penalties will be imposed far in excess of those contemplated by the statute. *In re Snow*, 120 U. S. 274.

Situations similar to this will constantly arise in the enforcement of wartime price control legislation, and it is important that this issue be clarified, so that the enforcement of the Emergency Price Control Act may be free from caprice and uncertainty. The situation presented by this indictment is in no sense peculiar to a single case. The indictments which were returned in this case could be returned in any case involving a charge of substantial violations of the Emergency Price Control Act.

The uncertainties and the possibilities of injustice opened by the instant case are real, and the jurisdiction of this Court is properly invoked to set them at rest.

2. The Circuit Court of Appeals has sanctioned conduct upon the part of the District Court which so far departs from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision on behalf, not only of these petitioners, but of all persons accused of crimes in the Federal Court.

This departure was twofold:

(a) The petitioner, Dowling Bros. Distilling Company, was convicted for the alleged criminal acts of Robert Gould, in the complete absence of proof that the corporation benefited by his acts and in the complete absence of proof that any representative of the corporation other than Robert Gould had knowledge of his allegedly unlawful conduct.

(b) Equally alien to proper standards of judicial procedure was the admission of highly prejudicial testimony relating to unlawful acts not charged in the indictment and for which petitioners had never been indicted or convicted. This improper testimony, admitted over timely objection and exception, may well have led to petitioners' conviction on the basis of testimony relating to extraneous matters rather than upon evidence relating to the acts upon which they were indicted. Aside from this prejudicial and inadmissible evidence, the only testimony against petitioners was that of persons admittedly participating in the allegedly illegal acts. Such action upon the part of the trial court flies in the face of overwhelming judicial authority, and constitutes flagrant and reversible error. *Boyd* v. *United States*, 142 U. S. 450, 12 Sup. Ct. 292, 37 L. Ed. 1077.

3. By sanctioning the admission of evidence relating to offenses not charged in the indictment, the Circuit Court of Appeals decided a federal question in conflict with applicable decisions of this Court.

Boyd v. *United States, supra*, holds that the admission of testimony relating to offenses not charged in the indictment constitutes reversible error. The testimony admitted in this case did not come within any recognized exception to the rule of the *Boyd* case, and, therefore, conflicted with it.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of

the Circuit Court of Appeals for the Sixth Circuit should be granted.

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